NO. 94643-4

SUPREME COURT OF THE STATE OF WASHINGTON

PIERCE COUNTY, a political subdivision of the State of Washington; and BLAIR SMITH, individually, and as an employee of Pierce County,

Petitioners,

v.

MARGIE M. LOCKNER, a single woman,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

Andy Woo
Assistant Attorney General
WSBA No. 46741
1125 Washington Street SE
Olympia, WA 98504
(360) 586-4034
OID No. 91033

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY AND INTEREST OF AMICUS CURIAE 2

III. ISSUES ADDRESSED BY AMICUS CURIAE 2

IV. STATEMENT OF THE CASE 3

V. ARGUMENT 3

A. Standard of Review 3

B. The Plain Language of RCW 4.24.210 Does Not Impose a "Sole Use" Requirement 4

1. Over 30 years of case law never found a "sole use" requirement in RCW 4.24.210 5

2. *Camicia* implies a "sole use" requirement in 2014 7

3. If *Camicia* does create a "sole use" requirement, it is erroneous and harmful and should be overturned 9

C. The Plain Language of RCW 4.24.210 Does Not Impose an "Authority to Close" Requirement 12

1. The "authority to close" test will cause public harm by increasing landowner liability 14

2. "Authority to close" is a problematic test even for non-owners 16

D. Imposing Additional Restrictive Requirements to RCW 4.24.210 Ignores the Legislature's Decision to Afford Recreational Immunity as Serving a Societal Interest 17

E. RCW 4.24.210 Limits Liability for Unintentional Injuries, Not Just Premises Conditions 19

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Camicia v. Howard S. Wright Constr. Co.,
179 Wn.2d 684, 317 P.3d 987 (2014) ..... passim

Chamberlain v. Dep't of Transp.,
79 Wn. App. 212, 901 P.2d 344 (1995) 11

Davis v. State,
102 Wn. App. 177, 6 P.3d 1191 (2000), *aff'd* 144 Wn.2d 612, 30 P.3d 460 (2001) 4, 5, 9

Estate of Bunch v. McGraw Residential Ctr.,
174 Wn.2d 425, 275 P.3d 1119 (2012) 3

Gaeta v. Seattle City Light,
54 Wn. App. 603, 774 P.2d 1255 (1989) ..... passim

Lockner v. Pierce Cty.,
198 Wn. App. 907, 396 P.3d 389 (2017) 3

Matter of K.J.B.,
187 Wn.2d 592, 387 P.3d 1072 (2017) 3

Matthews v. Elk Pioneer Days,
64 Wn. App. 433, 824 P.2d 541 (1992) 3, 17, 18

McCarver v. Manson Park & Recreation Dist.,
92 Wn.2d 370, 597 P.2d 1362 (1979) 5, 6, 7, 18

Mucsi v. Graoch Assocs. Ltd. P'ship No. 12,
144 Wn.2d 847, 31 P.3d 684 (2001) 19

Nielsen v. Port of Bellingham,
107 Wn. App. 662, 27 P.3d 1242 (2001) 9

Partridge v. Seattle,
49 Wn. App. 211 (1987) 6

Ravenscroft v. Wash. Water Power Co.,
136 Wn.2d 911, 969 P.2d 75 (1998) 4

Riksem v. City of Seattle,
47 Wn. App. 506, 736 P.2d 275 (1987) 6, 7, 12

Rose v. Anderson Hay & Grain Co.,
184 Wn.2d 268, 358 P.3d 1139 (2015) 9

Rozner v. City of Bellevue,
116 Wn.2d 342, 804 P.2d 24 (1991) 4

State v. Barber,
170 Wn.2d 854, 248 P.3d 494 (2011) 10

State v. D.H.,
102 Wn. App. 620, 9 P.3d 253 (2000) 10

State v. Reis,
183 Wn.2d 197, 351 P.3d 127 (2015) 10

TCAP Corp. v. Gervin,
163 Wn.2d 645, 185 P.3d 589 (2008) 3

Tennyson v. Plum Creek Timber Co.,
73 Wn. App. 550, 872 P.2d 524 (1994) 14, 15, 17

Wash. Off Highway Vehicle All. v. State,
176 Wn.2d 225, 290 P.3d 954 (2012) 11

Widman v. Johnson,
81 Wn. App. 110, 912 P.2d 1095 (1996) 6, 7

Statutes

Laws of 1967, ch. 216, § 2 ..... 13, 18

Laws of 1969, 1st Ex. Sess., ch. 24, § 2 ..... 13, 18

Laws of 1972, ch. 153, § 17 18

Laws of 2011, ch. 53, § 1 18

RCW 4.24.200 20

RCW 4.24.200-.210 ..... 2, 3

RCW 4.24.210 ..... passim

RCW 4.24.210(1) 4, 19

RCW 79.10.120 11

RCW 79A.05.030(3) 16

Other Authorities

Restatement (Second) of Torts, § 8A 19

Restatement (Second) of Torts, § 328E 17

Restatement (Second) of Torts, § 332 9

Restatement (Second) of Torts, div. II, ch. 12-13 19

I. INTRODUCTION

The Legislature enacted the recreational use immunity statute in 1967 and steadily expanded its scope of application throughout the past 50 years to advance the public interest of encouraging the availability of public and private lands for outdoor recreational opportunities. The statute accomplishes this by limiting the liability of the owners or possessors of recreational lands with respect to unintentional injuries incurred on their lands by recreational users.

In reaching its decision below, Division II of the Court of Appeals limited the application of the recreational use immunity statute in two significant ways. First, it ruled that the statute applies only to land and water areas that are opened to the public *solely* for the purpose of outdoor recreation. Second, it ruled that the statute applies only to owners or possessors of land and water areas who have the "authority to close" the land to public outdoor recreation. Neither of these limits imposed by the Court of Appeals exist in the statutory language.

The State urges reversal as to Section B of the Analysis of the decision below, which calls the statute's applicability into question for many landowners and possessors of recreational lands—especially for those, such as the State of Washington, who own or possess these lands under complex arrangements or circumstances. By departing from existing jurisprudence on this matter in subtle but substantively significant ways, the Court of Appeals' holding misconstrues the recreational use immunity statute and undermines the legislative intent. Because the decision below relied extensively on this Court's recent decision in *Camicia v. Howard S.*

Wright Construction Co., 179 Wn.2d 684, 317 P.3d 987 (2014), the State also respectfully urges the Court to reexamine and clarify its ruling in *Camicia*. In the alternative, if this Court determines *Camicia* requires landowners to open the land to the public solely for outdoor recreational purposes and/or have the "authority to close," the State respectfully urges the Court to overturn *Camicia* as erroneous and harmful.

The State, however, urges affirmance as to Section C of the Analysis of the decision below, which correctly held that recreational use immunity applies to "unintentional injuries," not just premises liability claims.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

As set out more fully in the State's accompanying motion to file this brief, the State of Washington—through various state agencies, departments, and commissions—owns, manages, and maintains many of Washington's most treasured lands, waters, and historic places for the public's benefit and, in many cases, recreational enjoyment. Many of these lands—whether providing public outdoor recreation as the primary function of a state agency's mandate or as a secondary benefit of its broader mission—implicate mixed, secondary, or multiple-use scenarios. In many cases, state agencies, for various reasons, may not have the authority at the time of the alleged injury to close the land to public outdoor recreation.

III. ISSUES ADDRESSED BY AMICUS CURIAE

1. Does Washington's recreational use immunity statute, RCW 4.24.200-.210, require landowners, hydroelectric project owners, and others in possession and control of land to (a) open that land solely for the

purpose of public outdoor recreation and (b) have the authority to close that land in order to avail themselves of the limitation of liability provided by the statute?

2. Does the limitation of liability conferred by RCW 4.24.200-.210 apply only to premises liability claims?

IV. STATEMENT OF THE CASE

The State relies on the statement of facts set forth in *Lockner v. Pierce County*, 198 Wn. App. 907, 909-10, 396 P.3d 389 (2017).

V. ARGUMENT

A. Standard of Review

This case involves statutory interpretation, which is an issue of law. *TCAP Corp. v. Gervin*, 163 Wn.2d 645, 650, 185 P.3d 589 (2008). Issues of law are reviewed de novo. *Id.* Because the recreational use immunity statute is in derogation of common law, it is strictly construed. *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437, 824 P.2d 541 (1992).

In interpreting a statute, the court's fundamental objective is to discern and implement the intent of the Legislature by giving effect to the plain meaning of a statute. Where the statutory language is plain and unambiguous, the court derives the statute's meaning from the wording of the statute itself. *Matter of K.J.B.*, 187 Wn.2d 592, 597, 387 P.3d 1072 (2017). If a statute is ambiguous, the court may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent, but a statute is not ambiguous simply because two or more interpretations are conceivable. *Estate of Bunch v. McGraw*

Residential Ctr., 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). Instead, the court adopts the interpretation that best advances the legislative purpose. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). Undefined terms also do not render a statute ambiguous; rather, the court gives an undefined term its plain and ordinary meaning unless a contrary legislative intent is indicated. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998).

B. The Plain Language of RCW 4.24.210 Does Not Impose a "Sole Use" Requirement

The core statutory language conferring recreational immunity provides as follows:

> Except as otherwise provided . . . any public or private landowners, hydroelectric project owners, or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation . . . without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

RCW 4.24.210(1). This language changes the common law by altering the entrant's status from that of a "trespasser, licensee, or invitee to a new statutory classification of recreational user." *Davis v. State*, 102 Wn. App. 177, 184, 6 P.3d 1191 (2000), *aff'd* 144 Wn.2d 612, 30 P.3d 460 (2001). Accordingly, landowners and occupiers generally are not liable for the injuries incurred by recreational users of their land unless the injured party overcomes the immunity by showing one of the following statutorily provided exceptions: (1) a fee was charged for the use of the land, (2) the injury inflicted was intentional, or (3) the injury was caused by a known

dangerous artificial latent condition and no warning signs were posted. *Davis*, 144 Wn.2d at 616.

None of the language quoted above from RCW 4.24.210 requires landowners[1] to dedicate the property *solely* to recreational purposes in order to invoke the statutory immunity. The statute requires that the owners "allow members of the public to use [the lands] for the purposes of outdoor recreation," and this language in no way restricts the owners from applying the land to other uses besides recreation. It instead suggests that the Legislature intended for a broader application of recreational immunity to any lands open for outdoor recreation, even if it has other non-recreational public uses.

1. Over 30 years of case law never found a "sole use" requirement in RCW 4.24.210

This Court examined the question of sole recreational use in 1979 when an injured party challenged the application of recreational use immunity by raising the exact opposite argument as the one before the Court today. *McCarver v. Manson Park & Recreation Dist.*, 92 Wn.2d 370, 597 P.2d 1362 (1979). In *McCarver*, the plaintiff argued that "the statute was not intended to apply to land or water areas available exclusively for recreational purposes," but only to land/water areas primarily used for other purposes, but with "incidental recreational use." *Id.* at 377. The plaintiff's underlying rationale was that recreational use immunity should not apply where it is not necessary "to encourage" the landowner to allow recreational

[1] For purposes of this subsection, this brief will use the terms "owners" and "landowners" as also including "others in possession or control."

use, such as where the land is devoted exclusively to recreational use. *See id.* This Court emphatically rejected the invitation to limit recreational use immunity in that manner, holding that the decision as to whether to impose a limiting construction based on primary and secondary uses of the land is a matter that "should appropriately be addressed to the legislature." *Id.*

McCarver was followed by *Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987), where a bicyclist on the Burke-Gilman Trail collided with a jogger and sued the City of Seattle, which owned the trail. *Riksem* upheld summary dismissal under the recreational immunity statute, and addressed the issue of multiple uses, holding that "[l]and which was primarily used for recreational purposes having other incidental uses would certainly apply under the statute as well." *Id.* at 512. *See also Partridge v. Seattle*, 49 Wn. App. 211, 212-13 (1987) (rejecting the argument that the statute should be narrowly construed to apply only if the owner merely "allowed" public recreational use but not if the owner "invited" such use). More recently, the court of appeals upheld recreational immunity for an automobile collision occurring on a private logging road open to public recreation. *Widman v. Johnson*, 81 Wn. App. 110, 912 P.2d 1095 (1996). The court rejected plaintiff's argument that the land must be "restricted to 'recreational purposes,'" and ruled that because every reasonable person would have believed that the road was open for recreational use, the fact that it was being used by the public for other purposes—as a shortcut by non-recreating members of the public, for example—lacks legal

significance. *Id.* at 114. The landowner expressly allowed public recreation on the roads and was thus entitled to recreational use immunity. *Id.*

2. *Camicia* implies a "sole use" requirement in 2014

Neither *McCarver*, *Riksem*, nor *Widman* interpreted RCW 4.24.210 as requiring that the property be dedicated solely to recreational use as a prerequisite to recreational use immunity. The first suggestion in case law that sole recreational use is a statutory requirement arises from this Court's recent decision in *Camicia*, which formed the basis for the decision below.

In *Camicia*, a bicyclist was injured on a bike path owned by the City of Mercer Island, but the bike path had been constructed with transportation funds by the Department of Transportation and transferred to the City "for road/street purposes only" under the terms of the quit claim deed. 179 Wn.2d at 692. *Camicia* observed that one of the threshold elements for determining if the statute applies is whether the land is open to the public for the purposes of outdoor recreation. *Id.* at 697. The determination of whether the land is "recreational" in terms of the applicability of the statute "is to view it from the standpoint of the landowner or occupier." *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608, 774 P.2d 1255 (1989). When the landowner has brought itself within the terms of the statute by allowing the public to use its land for outdoor recreation, then it is immaterial that an injured party may have entered the land for purposes other than recreation. *Id.* at 609.

Although courts determine whether the land is recreational from the landowner's viewpoint, *Camicia* rejected the City of Mercer Island's

argument that "recreational immunity follows from the mere presence of incidental recreational use of land that is open to the public," 179 Wn.2d at 697, noting that incidental occurrence of recreational bicycling by itself was not enough to prove public recreational use, and that it remained a question of fact as to whether the land in question was open for the purpose for outdoor recreation at all. *Id.* at 699-701.

However, *Camicia* further suggests that recreational immunity may not be available if the land is already "open" to other public purposes:

> Where land is open to the public for some other public purpose—for example as part of a public transportation corridor—the inducement of recreational use immunity is unnecessary. It would make little sense to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use.

179 Wn.2d at 697; *see also id.* at 703 ("the trier of fact could find that the I-90 trail is open for the public purpose of transportation rather than recreational use"). Although these statements do not *expressly* state that any other use of the property than for recreational purposes precludes reliance on RCW 4.24.210, they strongly imply such a requirement. The dissenting opinion in *Camicia* believed the majority did create this new requirement. *Id.* at 705 (Madsen, C.J., dissenting). The decision below similarly interpreted *Camicia* as limiting recreational use immunity to lands open to the public solely for recreational purposes, *Slip Op.* at 8, and thereby reversed summary judgment and remanded for the trial court to determine "whether the Foothills Trail was opened to the public *solely for the purpose of recreational use*." *Slip Op.* at 9 (emphasis added).

On the other hand, the decision below could have over-interpreted

Camicia, as the *Camicia* majority opinion never *expressly* states that lands must be used solely for recreational purposes. To be consistent with the statutory language, legislative intent, and prior case law, *Camicia* should stand for the more limited proposition that mere incidental occurrence of recreational use is not sufficient by itself to establish that the land is open to the public for outdoor recreation,[2] although it would then leave open the unresolved question of just how much recreational use would be more than incidental—and no language in the statute offers an answer. If *Camicia*'s holding is limited to mere incidental recreational use being insufficient to invoke recreational immunity, then this Court should reverse the decision below because *Camicia* is distinguishable from the facts in this case, where the trial court found that outdoor recreation did not just occur incidentally, but was in fact "the primary purpose of this Foothills Trail." RP 22-23.

3. If *Camicia* does create a "sole use" requirement, it is erroneous and harmful and should be overturned

To the extent the majority in *Camicia* intended the new sole use requirement as found by the decision below, this Court should reverse the decision below and overturn *Camicia*. This Court will overrule prior decisions when they are incorrect and harmful. *See Rose v. Anderson Hay &*

---

[2] *Cf. Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242 (2001), in which the Port argued recreational immunity should apply because "visitors . . . walk on the floats and docks, enjoy the view, and look at the boats" at the Port's commercial marina without paying any fee. *Id.* at 665-66. The court rejected that argument, noting, "from any reasonably objective measure of the Port's 'standpoint,' the purpose of its marina . . . is commercial." *Id.* at 668. The *Nielsen* court also noted the nuanced distinction between *Nielsen*, where the injured party is a business visitor, and *Gaeta*, where the injured party was a public invitee. *Nielsen*, 107 Wn. App. at 667-68; *see also* Restatement (Second) of Torts, § 332; *Davis*, 144 Wn.2d at 616 (holding that RCW 4.24.210 specifically modifies the common law duty owed to public invitees).

Grain Co., 184 Wn.2d 268, 358 P.3d 1139 (2015). Decisions have been found to be incorrect when they are inconsistent with the constitution or statutes. *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). A long-standing precedent was found harmful when it destroyed the public benefit in the best use of the State's trust lands. *Barber*, 170 Wn.2d at 865.

The State respectfully urges this Court to re-examine the rationale for and implications of reading this new "sole use" test into the recreational use immunity statute for two reasons.

First, such construction goes beyond and conflicts with the plain language of the statute. No language in RCW 4.24.210 requires the owner to hold the land open to the public *solely* for public recreation. Although *Camicia* cited the legislative intent section as rationale for imposing this additional requirement, *Camicia*, 179 Wn.2d at 695-97 (quoting RCW 4.24.200), Justice Madsen astutely noted in her dissent that this rationale fails to account for the fact that "[t]he aim of the statute is not merely that land be open to the public" for any reason, but that it specifically be "*available for public recreational use.*" *Id.* at 703-04 (Madsen, C.J., dissenting) (emphasis in original). Furthermore, legislative statements of intent "are not controlling" and merely serve as an important guide in construing the operative sections of the law. *State v. Reis*, 183 Wn.2d 197, 212, 351 P.3d 127 (2015). Legislative intent statements cannot be relied upon to override unambiguous statutory language in the operative sections of the law. *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253 (2000).

Second, a broad reading of *Camicia* is harmful because it will

countermand the statutory purpose by discouraging landowners from allowing recreational uses on lands that have other uses. *Camicia* reasoned that "[i]t would make little sense to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use." 179 Wn.2d at 697. However, if recreational use immunity no longer applies to mixed-use lands, landowners would be faced with the dilemma of allowing secondary recreational use and then being faced with increased tort liability.

Public landowners like the State and counties would particularly be affected, as public lands are frequently held open to the public for multiple uses. It is not uncommon, for example, for roads or trail systems on state-owned lands to serve both the purposes of public outdoor recreation as well as some form of public transportation.[3] In some cases, the mixed use is by design. *E.g., Chamberlain v. Dep't of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995) (recreational immunity case involving Deception Pass Bridge, which serves as a recreational "Scenic Overlook" as well as a transportation corridor of State Route 20). DNR likewise manages over 3.5 million acres of state trust land and state forest lands for multiple uses pursuant to RCW 79.10.120—such as opening the lands to the public for both outdoor recreation as well as a public right-of-way. In other cases, roads constructed

[3] This becomes all the more troubling for the State if the courts use the source of funding to infer that the public land is being held open for non-recreational purposes. *See Camicia*, 179 Wn.2d at 689 (noting that "[n]o funds designated for recreational facilities were used in constructing the path"). Many state park roads, for example, were constructed using transportation funds. *See generally Wash. Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 290 P.3d 954 (2012) (upholding the constitutionality of a legislative appropriation of motor vehicle fuel excise tax revenues for park maintenance). Similarly, roads on DNR lands are very rarely constructed using recreational funds.

to provide public access on state-owned lands for recreational purposes end up as de facto transportation corridors. WDFW's Beebe Springs Wildlife Area/Water Access Site, for example, is open to the public for outdoor recreational purposes. However, because its on-site restroom facilities and parking area are located right off of U.S. Highway 97, the site has become a de facto rest stop for highway travelers and commuters. *Camicia*, as interpreted by the decision below, appears to remove recreational immunity from these types of lands because they are not open *solely* for recreational use. The resulting increase in liability could cause public landowners to limit recreational access, thus undermining the very purpose and practical effect of recreational use immunity.

C. The Plain Language of RCW 4.24.210 Does Not Impose an "Authority to Close" Requirement

Prior to *Camicia*, if the land was opened to the public for recreational purposes without a fee, the recreational use statute applied and "[i]t is of no consequence" that the occupier of the land was compelled to open the lands. *Gaeta*, 54 Wn. App. at 607-08 (addressing the question of whether Seattle City Light, as a licensee on federal land, had "lawful possession and control" even if it is compelled by the federal government to open the land to the public for recreational purposes); *see also Riksem*, 47 Wn. App. at 510-11 (rejecting plaintiff's contention that the City of Seattle was not entitled to recreational immunity because the city was only a successor-in-interest to the entity that opened the Burke-Gilman Trail). The decision below, however, concluded that under *Camicia*, Pierce County must demonstrate the "authority to close" the bike path in order to avail

itself of recreational use immunity. This "authority to close" test is inconsistent with the statutory language and legislative intent. As with a "sole use" requirement, the "authority to close" requirement for landowners would not only depart from the plain language, but also undermine the statutory purpose of encouraging the opening of lands to recreation. This Court should renounce any such requirement.

Based on the plain language of RCW 4.24.210, recreational use immunity extends to two categories of individuals/entities as long as they allow the public to use their land for outdoor recreation without charging a fee: (1) public and private "landowners," including owners of hydroelectric projects; and (2) "others in lawful possession and control" of the land. *Camicia* conflated these two distinct categories of individuals/entities by holding that recreational use immunity applies "only to those landowners with 'lawful possession and control' over land." With this conflation, *Camicia* qualified the term "landowner" with the requirement of "possession and control." 179 Wn.2d at 696. This does violence to the statutory language and it is inconsistent with the legislative intent shown through the history of statutory amendments.

The Legislature did not intend to modify "landowner" with the phrase "in lawful possession and control." When the original law was enacted, it applied to landowners of agricultural or forest lands and did not include any language about "possession and control." Laws of 1967, ch. 216, § 2. The Legislature added the new phrase "others in lawful possession and control" two years later. Laws of 1969, 1st Ex. Sess., ch. 24,

§ 2. This 1969 addition of "others" allows for recreational use immunity to extend to more than just landowners, while the "possession and control" requirement prevents over-inclusion by limiting it to non-owners who have "a broader, more permanent interest in the land," rather than someone who just happens to be using the land. *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 557, 872 P.2d 524 (1994). This historic context establishes that the Legislature intended the "possession and control" requirement to apply only to "others," not to landowners.

The *Tennyson* court addressed the "possession and control" requirement in the context of non-owners. In that case, a group of contractors was sued by a recreational off-road motorcyclist in relation to the contractors' excavation work on land that was owned by Plum Creek Timber Company and open to the public for outdoor recreation. *Id.* at 552. The contractors argued, among other things, that they were protected by recreational use immunity. *Id.* at 557. The *Tennyson* court found that RCW 4.24.210 was intended to protect an entity with "a degree of permanence" in relation to the property, "not merely one who is using the property." *Tennyson*, 73 Wn. App. at 557. Applying this principle, the court rejected the contractors' argument, noting that the contractors went onto the property solely for the purpose of fulfilling their contractual obligations, and left after these obligations were met. *Id.* at 558.

1. The "authority to close" test will cause public harm by increasing landowner liability

While it is important, and in fact necessary, to assess "lawful possession and control" when someone who does not own the land such as

the contractors in *Tennyson* claims recreational use immunity, this assessment becomes unnecessary and problematic when applied to landowners who inherently already have the broadest, most permanent interest in the land possible. Connecting "landowners" with the "possession and control" requirement or requiring them to prove an "authority to close" in order to claim recreational use immunity not only unnecessarily calls into question the owner's interest in its land, but will also prove problematic and lead to anomalous results.

For example, if *Camicia* is correct that landowners must have both possession and control in order to claim recreational use immunity, landowners who are not in possession of their land (such as a landlord who has given possession of the land to a lessee/tenant) could be liable for unintentional injuries to recreational users.[4] Similarly, it is not uncommon for state agencies to obtain easements from private landowners for the purpose of expanding public outdoor recreation. Because an easement is a nonpossessory property interest, the landowner in that case would still technically have possession, while the agency would have some degree of control. Under *Camicia*'s "authority to close" requirement, neither the landowner who granted the easement nor the agency that manages the easement might qualify for protection under the statute. Excluding these landowners and agencies from the application of RCW 4.24.210 would certainly run contrary to, if not outright undermine, the statutory purpose.

[4] On the other hand, while the tenant has possession, it may not have "control," to the extent "control" is determined by the "authority to close" test. As a result, both the landlord and the tenant could be liable to recreational users because while the landlord has "control" and the tenant has "possession," neither has "possession *and* control."

Agencies may shun such arrangements in the future if recreational immunity is unavailable, resulting in a loss of recreational opportunities.

A further complication from the State's perspective, and likely from those of other public landowners, is the question of whether the "authority to close" test would bar a governmental agency from the protection of the recreational immunity statute if it is compelled, in one way or another, to keep public lands open for public outdoor recreation. State Parks, for example, exists for the mission of holding lands open to the public for outdoor recreation. RCW 79A.05.030(3). The question of whether a state agency like State Parks has "authority" to close public lands to the public is a complicated one. State agencies may have the authority to temporarily close public lands for administrative reasons—such as public safety, construction, and maintenance—but they cannot simply decide to categorically close state-owned lands to the recreating public in the way that a private landowner could.

2. "Authority to close" is a problematic test even for non-owners

As discussed above, if a non-owner is claiming recreational use immunity, the court must assess whether that non-owner entity has "lawful possession and control" of the land. However, an "authority to close" test may still be problematic.

In *Gaeta*, when confronted with the question of whether Seattle City Light (SCL), as a licensee on federal land, had "lawful possession and control" if it is compelled by the federal government to open the land to the public for recreational purposes, the court concluded that if the land is

opened to the public for recreational purposes without a fee, the recreational use statute applies and "[i]t is of no consequence" that the occupier of the land was compelled to do so. 54 Wn. App. at 607-08. Based on *Gaeta*, SCL's status as an entity with "lawful possession and control" for the purpose of RCW 4.24.210 did *not* include the authority to close.

Unlike the contractors in *Tennyson*, the interest of a licensee or lessee is much broader and more permanent than that of the contractors' contractual obligations. From a property rights standpoint, there is also generally no question that licensees and lessees have "lawful possession and control."[5] But under *Camicia*'s "authority to close" test, as followed by the decision below, many licensees/lessees could be excluded from the application of recreational use immunity.

D. Imposing Additional Restrictive Requirements to RCW 4.24.210 Ignores the Legislature's Decision to Afford Recreational Immunity as Serving a Societal Interest

The Court's decision in this case will have significant policy implications within the State. In rendering its decision, the Court should consider the value that the Legislature has placed on recreational use immunity. Twenty-five years ago in *Matthews*, Division III of the Court of Appeals observed that "the trend in the law is toward abrogation of many of the statutory and common law immunities for negligence." 64 Wn. App. at 439. The court of appeal's decision in this case and *Camicia* follow this trend. Yet, a review of the legislative history of the recreational use

[5] Although the Legislature did not define these terms in RCW 4.24.210, they appear to be concepts that were carried over from common law premises liability. Restatement (Second) of Torts defines "possessor of land" as "a person who is in occupation of land with intent to control it." § 328E.

immunity statute demonstrates an opposite trend by the Legislature.

Throughout the past 50 years since the statute's passage, the Legislature enacted numerous amendments to expand its scope of application. As originally enacted, the statute covered only "landowners" of "agricultural or forest lands." Laws of 1967, ch. 216, § 2; *see McCarver*, 92 Wn.2d at 374. In 1969, the Legislature extended recreational use immunity to "others in lawful possession and control" of the land so as to cover non-owner occupants of land, such as renters or lessees. Laws of 1969, 1st Ex. Sess., ch. 24, § 2, and then further expanded the category of "landowners" to include both public and private landowners, Laws of 1972, ch. 153, § 17, as well as to include "hydroelectric project owners" as a type of landowner, Laws of 2011, ch. 53, § 1. The Legislature also passed other amendments to broaden the scope of recreational use immunity in various ways. Each substantive amendment to the recreational immunity law since its inception in 1967 has broadened, not narrowed, the scope of immunity. *See* Chart of Legislative Amendments, attached as Appendix A.

The *Matthews* court ultimately concluded "only that immunity which is necessary to serve the particular societal interest involved" should remain recognized by the courts. To the extent this Court may agree with that conclusion, special consideration should be given to the clear indications, both through the legislative purpose as well as the legislative history of the statute, that the Legislature considers recreational use immunity to be one of those immunities necessary to serve a particular societal interest. Any additional restrictions should be added to

RCW 4.24.210 by the Legislature, not the courts.

E. RCW 4.24.210 Limits Liability for Unintentional Injuries, Not Just Premises Conditions

The decision below correctly ruled that "[b]y its plain language, [recreational use] immunity extends to negligence actions and is not restricted to premises liability claims." *Slip Op.* at 9. The State urges affirmance on this issue.

Ms. Lockner asserts RCW 4.24.210 merely limits premises liability, but the statutory language as well as the legislative intent refute this. The statute states that owners "shall not be liable for *unintentional injuries* to such users." RCW 4.24.210(1) (emphasis added). "Intent" as an element of a tort claim is defined by Restatement (Second) of Torts as denoting "that the actor desires to cause consequence of [its] act, or that [it] believes that the consequences are substantially certain to result from it." § 8A. Consistent with this definition, premises liability is considered a type of negligence liability under Washington case law. *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847, 854-55, 862, 31 P.3d 684 (2001); *see also* Restatement (Second) of Torts, div. II, ch. 12-13 (categorizing the chapter on premises liability under the topic of negligence, separate from intentional torts). The statute's use of the term "unintentional injuries" therefore strongly indicates that it should not be interpreted as applying to only one type of negligence liability, and not others.

The legislative intent for RCW 4.24.210 to extend to immunity to unintentional acts or omissions of a person is further supported by its statutorily stated purpose to "encourage owners . . . by limiting their

liability toward persons entering thereon *and* toward persons who may be injured or otherwise damaged *by the acts or omissions of persons entering thereon.*" RCW 4.24.200 (emphasis added). This reference to the actions of persons necessarily goes beyond premises conditions.

VI. CONCLUSION

The Court should apply the recreational use immunity statute as expressed through its plain meaning to achieve its legislative purpose. For the foregoing reasons, the Court should (1) reverse Section B of the decision below, which—in apparent reliance on *Camicia*—imposes additional requirements on landowners that are not present in the statutory language of RCW 4.24.210 and contrary to its intended purpose and effect, and (2) affirm Part C of the decision below, which correctly held that recreational use immunity is not limited to premises liability claims.

RESPECTFULLY SUBMITTED this 12th day of January, 2018.

ROBERT W. FERGUSON
Attorney General

s/Andy Woo
Andy Woo
Assistant Attorney General, WSBA 46741
1125 Washington Street SE
Olympia, WA 98504
(360) 586-4034
OID No. 91033

FISH, WILDLIFE, & PARKS DIVISION - ATTORNEY GENERAL'S OFFICE

January 12, 2018 - 4:37 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94643-4
Appellate Court Case Title:	Margie Lockner v. Pierce County, et al.
Superior Court Case Number:	15-2-05353-7

The following documents have been uploaded:

- 946434_Briefs_20180112163321SC475715_8174.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was AmicusSupplBrief_Final.pdf
- 946434_Cert_of_Service_20180112163321SC475715_4954.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was COS_Amicus Brief.pdf
- 946434_Motion_20180112163321SC475715_9737.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was AmicusMotionForSuppBrief.pdf
- 946434_Other_20180112163321SC475715_1702.pdf
  This File Contains:
  Other - Appendix A
  The Original File Name was Appendix A converted.pdf

A copy of the uploaded files will be sent to:

- Casey@hesterlawgroup.com
- ack@vnf.com
- arosenberg@williamskastner.com
- dawn.taylor@pacificalawgroup.com
- dmg@vnf.com
- jhager@williamskastner.com
- leeann@hesterlawgroup.com
- litdocket@foster.com
- milt.rowland@foster.com
- msommer@co.pierce.wa.us
- paul.lawrence@pacificalawgroup.com
- pcpatvecf@co.pierce.wa.us
- seand@wsba.org
- sgross@cityofpt.us

Comments:

Sender Name: Hang Nguyen-Le - Email: hangn@atg.wa.gov
Filing on Behalf of: Andy Woo - Email: andyw@atg.wa.gov (Alternate Email:)

Address:
1125 Washington Street SE
PO Box 40100
Olympia, WA, 98504
Phone: (360) 753-2498

Note: The Filing Id is 20180112163321SC475715

Appendix A:
Legislative History of Recreational Use Immunity[1]

Year	Legislation	Effect
1967	ESHB 258, Laws of 1967, ch. 216	Enacted to limit landowner liability toward persons entering thereon and toward persons injured or otherwise damaged by the acts or omissions of persons entering thereon (unintentional injuries only). Applies only to agriculture and forest lands.
1969	EHB 128, Laws of 1969, 1st Ex. Sess., ch. 24	(1) **Expanded** by extending protections to renters or lessees of land (lawful possession and control). (2) **Expanded** to also include water areas or channels where access is made available. (3) **Expanded** protection to owners or renters of forest and agricultural lands or water areas or channels and rural lands adjacent to such areas or channels. (4) **Expanded** by adding swimming, boating, and water sports to the list of activities.
1972	Laws of 1972, ch. 153, § 17	(1) **Expanded** to include both public and private landowners and adds pleasure driving of all-terrain vehicles, snowmobiles, and "other vehicles."
1979	HB 50, Laws of 1979, ch. 53	(1) **Expanded** application to include "any lands whether urban or rural." (2) **Expanded** to indicate coverage is not limited to the listed activities (by adding "includes but is not limited to"), but also expressly adds bicycling, the riding of horses or other animals, and clam digging.

[1] This summary table excludes a 2003 amendment and a 2011 amendment enacted only for the purpose of codification updates. In the summary, bold typeface is used to indicate whether the amendment **expands** or **restricts** recreational use immunity's scope of application.

Year	Legislation	Effect
		(3) **Expanded** to not limit to all-terrain vehicles but to include all off-road vehicles. (4) **Expanded** protection to landowners/ possessors by providing that land usage by the public does not support any claim of adverse possession.
1980	SB 3474, Laws of 1980, ch. 111	**Expanded** the illustrative list of activities by adding "the cutting, gathering, and removing of firewood by private persons for their personal use" (without purchasing the firewood from the landowner, but landowners and other lawful possessors may charge up to $10 administrative fee for those cutting, gathering, and removing firewood).
1991	SB 5015, Laws of 1991, ch. 69	**Expanded** to include those who offer or allow permissive use for volunteer fish and wildlife cooperative projects, or allow access for cleanup of litter or other solid waste, shall not be liable for unintentional injuries to any volunteer or group or to any other users.
1991	SB 5630, Laws of 1991, ch. 50	**Expanded** to indicate that for purposes of the Act, "fees" does not include a license or permit issued under the chapters pertaining to wildlife, fisheries, and Parks and Recreation, thus extending recreational use immunity to the resource agencies that issue these licenses and permits.
1992	SHB 2330, Laws of 1992, ch. 52, § 1	(1) **Expanded** for landowners who are required to Leave Trees for Open Space land classification, that they shall not be held liable for any injuries or damages resulting from (the hazard of) leaving trees, including wildfire, erosion, and flooding.

Year	Legislation	Effect
		(2) And increases the administrative fee landowners can charge for cutting firewood.
1997	SSB 5254, Laws of 1997, ch. 26	**Expanded** by adding to illustrative list of activities "skateboarding or other non-motorized wheel based activities, hang-gliding or paragliding."
2003	HB 1195, Laws of 2003, ch. 16	**Expanded** by adding to illustrative list of activities "rock climbing," and also **expanded** by indicating that a "fixed anchor" used in rock climbing and put in place by someone other than the landowner is not a known dangerous artificial latent condition and that the landowner will not be liable for unintentional injuries resulting from the condition or use of the anchor.
2006	HB 2617	In view that local jurisdiction may allow off-road vehicle (ORV) use, RCW 4.24.210 is **expanded** to indicate that a daily charge of up to $20 for a person to access publicly owned ORV sports park or other public facility accessed by a highway, street, or non-highway road for purposes of ORV use is not a fee for purposes of recreational immunity.
2011	SSSB 5622, Laws of 2011, ch. 320, § 11	Specifies that the charge for a Discovery Pass is not a fee for purposes of recreational immunity.
2011	SB 5388, Laws of 2011, ch. 53, § 1	(1) **Expanded** by including hydroelectric project owners as a type of landowner entitled to recreational immunity. (2) Also **expanded** by adding to the illustrative list of activities "kayaking, canoeing, rafting." (3) And also **expanded** by indicating that

Year	Legislation	Effect
		releasing water or flows and making waterways or channels available for kayaking, canoeing, and rafting, and making adjacent lands available for viewing such activities, does not create a known dangerous artificial latent condition.
2012	HB 2244, Laws of 2012, ch. 15, § 1	**Expanded** by adding to the illustrative list of activities operation of airplanes, ultra-light airplanes, and parachutes.
2017	SHB 1464, Laws of 2017, ch. 245, § 1	**Expanded** by excluding the following from the definition of "fees" for the purpose of the statute: "Payments to landowners for public access from state, local or nonprofit organizations established under fish and wildlife cooperative public access agreements if the landowner does not charge a fee to access the land subject to the cooperative agreement."

FISH, WILDLIFE, & PARKS DIVISION - ATTORNEY GENERAL'S OFFICE

January 12, 2018 - 4:37 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94643-4
Appellate Court Case Title:	Margie Lockner v. Pierce County, et al.
Superior Court Case Number:	15-2-05353-7

The following documents have been uploaded:

- 946434_Briefs_20180112163321SC475715_8174.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was AmicusSupplBrief_Final.pdf
- 946434_Cert_of_Service_20180112163321SC475715_4954.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was COS_Amicus Brief.pdf
- 946434_Motion_20180112163321SC475715_9737.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was AmicusMotionForSuppBrief.pdf
- 946434_Other_20180112163321SC475715_1702.pdf
  This File Contains:
  Other - Appendix A
  The Original File Name was Appendix A converted.pdf

A copy of the uploaded files will be sent to:

- Casey@hesterlawgroup.com
- ack@vnf.com
- arosenberg@williamskastner.com
- dawn.taylor@pacificalawgroup.com
- dmg@vnf.com
- jhager@williamskastner.com
- leeann@hesterlawgroup.com
- litdocket@foster.com
- milt.rowland@foster.com
- msommer@co.pierce.wa.us
- paul.lawrence@pacificalawgroup.com
- pcpatvecf@co.pierce.wa.us
- seand@wsba.org
- sgross@cityofpt.us

Comments:

Sender Name: Hang Nguyen-Le - Email: hangn@atg.wa.gov
Filing on Behalf of: Andy Woo - Email: andyw@atg.wa.gov (Alternate Email:)

Address:
1125 Washington Street SE
PO Box 40100
Olympia, WA, 98504
Phone: (360) 753-2498

Note: The Filing Id is 20180112163321SC475715